93-896

No._____

Supreme Court, U.S.
FILED
DEC - 2 1993
OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES
October Term 1993

SHANTEE MONGA, and,
DHARAM DEV MONGA
Petitioners

v.

GLOVER LANDING CONDOMINIUM TRUST;
MARVIN FRANK, individually and as Chairman of
the Board of Governors; MARY E. HESSION,
individually and as Manager,
Respondents

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Should a waiver be presumed against plaintiffs who inadvertently failed to oppose defendants' motion for attorneys' fees but who presented meritorious arguments on appeal, where said waiver is in conflict with the First Circuit's prior decisions and is the basis for affirminig a $301,709.56 fee award which is unreasonable on its face?

May a court award attorneys fees which are unreasonable on their face without an explanation or indication of the legal basis for its award where applicants sought fees under 42 U.S.C. 1988, Massachusetts Gen.L. c.231 Sec. 6F, Fed.R.Civ.P.11, and the Inherent Powers of the Court, and may such fees be assessed jointly and severally, against one of two fee targets in violation of civil rights and fee-shifting statutes?

Does a fee award of $301,709.56, the reasonableness of which is not supported by substantial evidence and which exceeds awards in comparable cases by as much as 1200%, violate petitioners' Due Process Rights and the Excessive Penalties Clause of the Eighth Amendment of the Constitution of the United States?

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STATEMENT OF JURISDICTION

During the period relevant to this action, Shantee Monga and Dharam D. Monga ("petitioners") owned and resided in a condominium unit at Glover Landing Condominium Trust ("GLCT") complex located in Marblehead, Massachusetts. In October 1988, petitioners filed a complaint in the Federal District Court in Boston against GLCT; Marvin Frank ("Frank"), Chairman of the Board of Governors and a member of the GLCT Board; and against Mary Hession ("Hession") who was the manager of GLCT (collectively "respondents"). Petitioners were the only minority residents at the 115 unit complex where the remaining 114 units were occupied by white residents.

Petitioners sought redress for respondents' unlawful housing practices under state and federal laws; interference with their exercise of state and federally protected civil rights; breach of fiduciary duty; interference with contractual relations; breach of contract; slander; and intentional infliction of emotional distress. Petitioners contend that the discriminatory acts were committed by respondents because of petitioners' race, color, ancestry, national origin and/or religious creed, as they are dark-skinned, Hindu individuals of East-Indian origin.

Petitioners' lawsuit was dismissed by the District Court on February 3, 1992 for failure to prosecute. On February 7, 1992, respondents filed a Motion for Attorneys' Fees and Costs ("fee application") seeking, against the two petitioners, jointly and severally, attorneys' fees of $282,207.50 and costs of $19,602.06 totaling $301,709.56. Respondents sought fees under 42 U.S.C. Sec. 1988; Rule 11 of the Federal Rules of Civil Procedure; Massachusetts Gen. L. c. 231 Sec 6F;

and the Inherent Power of the Court. Attorney Curtis, one of the eight (8) attorneys who billed services for the law firm representing respondents submitted an affidavit, a memorandum of law, and an incomplete billing summary. Petitioners inadvertently did not oppose the fee application.

On March 13, 1992, the District Court allowed the fee application in the full amount of $301,709.56 with only the following footnote order (the "Order"):

> No opposition being filed, the court grants defendants' motion as reasonable fees and costs.

On April 10, 1992, petitioners filed a Notice of Appeal from the Order to the First Circuit Court of Appeals (the "First Circuit"). Briefs were timely filed.

On March 13, 1993, without oral arguments, the First Circuit issued an ***unpublished opinion*** affirming the District Court Order awarding $301,709.56 as reasonable fees (the "Opinion"). On July 8, 1993 the First Circuit denied petitioners' Motion For Reconsideration. On October 7, 1993 and November 8, 1993 the First Circuit denied petitioners' subsequent Motions For Reconsideration.

On September 24, 1993 petitioners filed with this Court a Motion for Enlargement of Time which was allowed. The time for filing the Writ of Certiorari was extended to include December 5, 1993.

This Court has jurisdiction to hear an appeal of the First Circuit's decision pursuant to 28 U.S.C. Sec. 1254.

STATEMENT OF THE CASE

Petitioners have represented themselves *pro se* throughout this lawsuit. Dharam Monga is an environmental engineer and is a naturalized citizen of the United States. He is also a non practicing member of the Massachusetts Bar. Mrs. Monga, is not a citizen of the United States but has permanent resident status. She is a graduate of an accredited law school but is not a member of any Bar and does not practice law (the First Circuit has erroneously identified Mrs. Monga as an attorney). Respondents have been represented by the law firm of Ropes and Gray which was retained at the expense of at least two liability insurers, Aetna and Amica Insurance Companies.

Within a few months of filing of the Complaint, on June 22, 1989, the District Court Harrington, J. hastily dismissed this lawsuit during a short motions hearing. On December 18, 1989, the First Circuit vacated the District Court's dismissal, and remanded the case for further proceedings. Despite the fact that petitioners prevailed on appeal, respondents filed a motion for attorneys' fees incurred in opposing the appeal of the June 1989 dismissal. The District Court denied respondents' motion. Trial was scheduled for October 1, 1990.

Even before depositions were noticed, and while the case was still in its nascent stages of discovery, on June 11, 1990, respondents filed a motion for summary judgment. On October 10, 1990, the District Court denied respondents' summary judgment motion on the most substantive counts of petitioners' claims. Respondents' renewed summary judgment motion dated December 26, 1990 was clearly frivolous and was ignored by the District Court.

On November 14, 1990, at the District Court's own initiative, a revised order was issued scheduling trial for April 1, 1991. On ground of an emergency requiring hospitalization of a family member, the District Court continued the trial to January 6, 1992. On January 6, 1992 petitioners appeared in court ready to proceed with the trial as scheduled. Respondents' counsel appeared with only one of the defendants. At this time the District Court, again on its own initiative, rescheduled the trial for February 3, 1992.

On February 1 and 2, 1992 the parties conducted settlement negotiations and reached an agreement which included the provision that respondents will not seek attorneys' fees in the underlying lawsuit. On February 3, 1992 Dharam Monga appeared with respondents before the District Court where respondents stated that they had negotiated a settlement agreement with Mr. Monga. Petitioner Shantee Monga did not appear due to medical reasons. At the same time, in an oral motion, Mr. Monga asked the District Court for a brief continuance on the basis that Shantee Monga was a material witness for him. The District Court denied the motion and dismissed the case on the ground of lack of prosecution.

Immediately after dismissal of the lawsuit on February 3, 1992 the parties decided to settle the matter on the same terms as had been agreed. In his subsequent letter addressed to Mr. Monga, Attorney Curtis stated that upon receipt of the Settlement Agreement he shall withdraw the fee application. Petitioners mailed the Settlement Agreement to Attorney Curtis making handwritten comments. The comments offered by petitioners were not substantive

in nature and did not dilute the safeguards sought by respondents. The record does not support respondents' subsequent position that the Settlement Agreement was a "take it or leave it" proposition. On March 13, 1993, while petitioners were awaiting the final draft of the Settlement Agreement from respondents, the District Court allowed the fee application in full.

Petitioners inadvertently failed to oppose the fee motion. There is no evidence whatsoever that petitioners' failure to raise issues in the District Court was intended to prejudice respondents in any manner or that petitioners had adopted it as a litigation strategy.

On April 13, 1992, petitioners filed a Notice of Appeal from the District Court's Order and timely filed briefs. On March 1, 1993, without a hearing, the First Circuit affirmed *per curium* the District Court fee award of $301,709.56 and rendered a Judgment accompanied by an unpublished opinion (the "Opinion").

The First Circuit held that because petitioners did not object to respondents' fee application in the District Court, review of the issues briefed by petitioners were foreclosed. Accordingly, none of petitioners' arguments were reviewed on appeal including arguments which were purely legal in nature such as petitioners' claim that the award was unreasonable on its face. The record shows that the word "reasonable" is conspicuous by its absence in the fee proceedings. Other than the District Court's conclusory statement that the fees were "reasonable" nowhere have respondents claimed that the fees sought were reasonable.

In their fee application respondents attempted to hold petitioners accountable for their exorbitant fees alleging that a handful of motions filed by petitioners during the course of litigation were unnecessary, and that petitioners resisted discovery. However, respondents' allegations are unsupported by the record. Petitioners' denial of said allegations is buttressed by the fact that respondents incurred fees of $3,554 (1% of the total fees) in responding to the allegedly unnecessary motions and $18,669 (6% of the total attorneys' fees) for **all** discovery related activities for the entire lawsuit. Moreover, it was respondents own witchhunt which increased their discovery costs as the record shows that discovery was limited. Nevertheless, these fees combined totaling less than 7% of the fee award shows that petitioners' alleged conduct could never be the reason for respondents incurring fees of $301,709.56.

That the fees awarded respondents are unreasonable on their face is further supported by the following details gleaned from the fee application: (a) Attorney Curtis billed his hourly rates at $185-225 although he had been a member of the bar for a little over three and one half years at the commencement of the lawsuit and from his affidavit it is evident that he lacked experience in housing discrimination law; (b) Attorney Curtis and other junior associates billed approximately $133,700.00 in fees at the average hourly rate of $181; (c) two senior partners incurred additional $65,285.00 in fees at hourly rates of $275-325 primarily conducting research and meeting other lawyers within the law firm; and (d) paralegals contributed $13,700.00 in fees at hourly rates of $70-85 (averaging $78). This summary pertains to the 24

month period from February 1990 through February 1992. Had respondents supplied the required contemporaneous billing summaries for the prior 15 months, the above fees would be substantially higher.

When divided into tasks, the fee application for the 24 months identified above shows that (a) $77,964.00 in fees were incurred in filing respondents' unsuccessful summary judgment motions; (b) $108,252.00 in fees were incurred for pre-trial preparation; (c) $4,382.00 in fees were incurred in filing other discretionary motions; (d) $18,669.00 in fees were incurred in **all** discovery related activities; (e) $3,554 in fees were incurred in responding to petitioners' motions which motions respondents characterize as unnecessary; (f) Expense of $2,958.00 was incurred for the Transcripts of Deposition Testimony (the only reasonable expense in the fee application); and (k) Costs of $16,644.00 were incurred for miscellaneous expenses including Xerox, facsimile, telephone, travel, parking, etc. The Costs include disbursements of $3,358.10 for photocopying, $4,206.63 for Computer Assisted Research and $4,818.50 for Automated Document Preparation.

In order to fully understand the unreasonable nature of the fees, it must additionally be noted that this was a lawsuit where the record shows that (1) there was limited discovery; (2) there were limited filings of pleadings; (3) there were no pretrial motions or jury instructions filed; (4) there was no trial; (5) by respondents' own admission the case was not vigorously litigated by petitioners and was dismissed for lack of prosecution; (6) petitioners, as *pro se* individuals, have limited legal resources and skills; and (7) the issues presented were not complex.

From these facts, it is hard pressed to find how respondents' counsels could have reasonably expended over 1520 hours in defending a lawsuit they described as meritless since the beginning. It is interesting, but not surprising that respondents' counsels never denied petitioners' assertion that the fees and rates approved by the District Court are unreasonable on their face.

The total absence of "billing judgment" is clear from additional facts in respondents' fee application. During the 24 month period from February 1990 through January 1992, respondents' eight (8) counsels, including four (4) senior partners, attended 146 meetings and conferences among themselves (including 114 conferences without identifying the subject matter); and collectively performed research on 89 different occasions, including unspecified research conducted by a senior partner on 43 different days. The number of meetings and conferences would actually be greater as respondents failed to provide billing summaries and contemporaneous records for the 15 month period from November 1988 through January 1990.

Respondents' fee application also shows that in the thirty nine month duration of the lawsuit (the First Circuit has erroneously labeled it as a "four year odyssey"), petitioners conducted virtually no activity for twenty months. The inactive periods as identified from the fee application and from the record of the case are: (1) Six months from June 22, 1989, the date the District Court dismissed the lawsuit to December 18, 1989, the date the First Circuit reversed the District Court dismissal; (2) Four months from June 11, 1990, the date defendants filed their summary judgment motion, to October 10, 1990, the date the

District Court ruled on the summary judgment motion; and (3) Ten months from April 1, 1991 through February 3, 1992.

In the fee application, respondents admit that during the ten month inactive period, "plaintiffs essentially took no further actions towards discovery" and that the "only acts during this period were the noticing of deposition of Herbert Cohn and Jane Ditzler" which depositions were never conducted due to respondents' own objections.

Despite this twenty month of **no activity** by petitioners, it is inexplicable why respondents billed $38,056.77 during April 22, 1989 - January 31, 1990; $11,698.67 during July 1990 - October 10,1990; and $109,634.67 during March 1991 - February 3, 1992, totaling $159,390.00.

In the fee application, respondents' counsels have provided time sheets but no actual invoices for the period February 1990 through February 1992 totaling $232,422.06 (invoices for only the period November 1988 through January 1990 were provided). From this omission it can reasonably be inferred that respondents' counsels did not invoice their insurance company clients for the full amount which they sought from petitioners in their fee application.

PETITION FOR WRIT OF CERTIORARI

Petitioners seek a writ of certiorari to review the First Circuit Court of Appeals' decision affirming the District Court's award of attorneys' fees of $282,207.50 and costs of $19,602.06 totaling $301,709.56 as reasonable fees on grounds of waiver. Research shows that the fee award of $301,709.56 is apparently the largest such award by a federal court in the history of the United States in comparable cases and exceeds other awards in orders of magnitude.

I. PRESUMPTION OF WAIVER IN THE INSTANT CASE IS IMPROPER

Although generally a federal appellate court does not consider an issue not passed upon below, *Singleton v. Wulff*, 428 U.S. 106, 120 (1975), courts have discretion to dispense with the raise-or-waive rule where the point raised has "sufficient merit" and "injustice might otherwise result", *Hormel v. Helvering*, 312 U.S. 552, 556-559 (1940); where waiver is due to inadvertence or oversight, and it will "seriously affect the fairness, integrity or public reputation of judicial proceedings", *Johnson v. United States*, 318 U.S. 189, 200 (1943); where a "fundamental error" is involved, *Sibbach v. Wilson & Co.*, 312 U.S. 1, 15 (1940); where it will result in "gross miscarriage of justice", *U.S. v. Slade*, 980 F.2d 27, 31 (1st Cir. 1992); where "public interest is otherwise implicated", *Foley v. Lowell*, 948 F.2d 10, 19 (1st Cir. 1991); where "justice demands flexibility", *Magicsilk Corp. of New Jersey v. Vinson*, 924 F.2d 123, 125 (7th Cir. 1991); and, where substantial sums are involved, *Weatherston's A.M. Serv. v. Minnesota M.L.I. Co.*, 100 N.W.2d 819, 826 (Minn. 1960).

Petitioners contend that one or more of the above recognized exceptions apply in the instant case so as to dispense with the raise-or-waive rule.

II. THE FIRST CIRCUIT'S PRESUMPTION OF WAIVER IN IS IN CONFLICT WITH ITS PRIOR RULINGS WHERE NO OPPOSITION WAS FILED

The First Circuit has required the district court in attorney fee cases to review fees critically and to act as a guarantor of fairness. In a case similar to that of petitioners' where no opposition to a fee motion was filed, *Wojtkowski v. Cade*, 725 F.2d 127, 130 (1st Cir. 1984) the First Circuit stated that:

> A party's failure to oppose a fee does not divest the court of power to determine what is a reasonable fee and to allow only that amount.

The *Wojtkowski* court based its decision on 42 U.S.C. 1988 which "confer[s] both responsibility and authority upon the court to control the reasonableness of the fee."

Similarly, in *Gabriele v. Southworth*, 712 F.2d 1505, 1507 (1st Cir. 1983) where the testimony in support of attorneys' fees was uncontradicted and unimpeached, the First Circuit noted that "fee determinations are not resolvable solely under adversary system procedures." It concluded that fee claims are subject to "the independent review of a court" for the judge to draw "on his own experience and wisdom and deciding whether the time spent on each phase was in excess of a reasonable amount."

In fact, after a detailed review of the fees approved by the district court, the First Circuit in *Gabriele*

reduced the number of hours and the rates although it had received "very little specific assistance" from the fee targets. *Id.*, at 1507. Justification for undertaking similar scrutiny by the appellate court is stronger in the instant case due to the fact that petitioners provided detailed analyses of respondents' fee application in their appellate brief to facilitate such a review.

That the *Gabriele* and *Wojtkowski* decisions continue to be important is evident from the numerous cases in which these decisions have been cited. *See, e.g., U.S. v. Metropolitan Dist. Comm'n*, 847 F.2d 12, 16, 17 (1st Cir. 1988). Recently, in *Foley, supra*, at 19, the First Circuit upheld *Wojtkowski* by rejecting a fee applicant's argument that he is entitled to all of the fees requested in absence of any opposition, stating that:

> We have, however, previously considered and rejected such an approach. Setting attorneys' fees is a delicate business; what the court orders in one case can, and often does, affect the outcome of fee applications in other cases ... the court has a duty to consider the application critically to ensure overall fairness - a duty that abides even when a fee target is slipshod in its opposition to a fee application.

That the First Circuit expects a district court to be more than just a referee ruling merely on procedural matters in fee cases is evident from the following statement in *Foley, supra*, at 20:

> [W]e recognize that a district court has a duty of independent inquiry in respect to fee applications ... and ... that duty is designed to ensure that a fee award, overall is justified, and that the amount of the award comes within the realm of reasonableness, broadly defined. In other words, "it falls to the court to act as the guarantor of fairness."

These cases show that a district court is required to perform an independent review function even if the fee target has not opposed the fee application. Despite such recent precedence, the First Circuit's radical departure in petitioners' case in presuming waiver under circumstances virtually identical to those existing in *Wojtkowski*, *Foley* and *Gabriele* is unjust as it creates two standards of review - one for other litigants and a different, but harsher standard for petitioners.

III. THE CASES CITED BY THE FIRST CIRCUIT HAVE BEEN MISAPPLIED

In presuming waiver, the First Circuit has misapplied the cases cited. The singular most important distinction in cases, such as *Blum v. Stenson*, 465 U.S. 886 (1983), *McDonald v. McCarthy*, 966 F.2d 112 (3d Cir. 1992) and *Foley*, *supra*, cited by the First Circuit, is that the appellate courts in these cases were not faced with fee awards which were unreasonable on their face. Furthermore, the fees in these cases were awarded to prevailing civil rights plaintiffs under the fee-shifting statutes whereas the fees in petitioners' case were awarded to defendants

against *pro se* plaintiffs apparently under four different theories.

Another key difference is that the Supreme Court in *Blum* presumed a waiver with respect to the accuracy and reasonableness of the number of hours billed and **not** to the rates because, as noted in *Blum*, the fee target chose not to challenge the accuracy or the number of hours billed as a "trial strategy". No such finding has been made in petitioners' case, and none exists. Likewise, in *Magicsilk*, *supra*, another case cited by the First Circuit, an intentional waiver against the fee targets could reasonably be inferred from their failure to respond as the district court had granted them additional time to respond to the fee application. These important circumstances are absent in petitioners' case thereby providing support to dispense with the raise-or-waive rule.

The *McDonald* and *Foley* cases also offer other significant differences. The Third Circuit specially noted in *McDonald*, *supra*, at 119, that fee targets' failure to challenge the reasonableness of the fee request was determinative because the Third Circuit considers "statutory fee litigation [as] adversarial litigation." Application of *McDonald* to petitioners' case is improper as the First Circuit holds the view that fee petitions are not always resolvable in an adversial setting. *Gabriele*, *supra*, at 1507.

The Supreme Court has stated that in cases where a waiver is presumed, the appellate court should carefully "point out the circumstances justifying application of the practice in the particular case." *See*, *Hormel*, *supra*, at 557. To emphasize the need for such justification, the Supreme Court in *Hormel* identified particular situations where a waiver had been upheld.

Such circumstances include situations where there was an "express waiver"; or where the newly presented question "had not been raised" in the administrative hearings, "or the Circuit Court of Appeals or in the petition of certiorari to this Court"; or where "[T]o remand the case for further findings will be futile." Id., 312 U.S., at 557-558.

In the instant case, omission of such analysis violates the *Hormel* rule. Had the First Circuit performed the required review, it would have found that none of the circumstances in *Hormel* or the cases cited therein exist in petitioners' case to support a waiver. The record shows that petitioners have not made any express waiver. Rather petitioners have raised strong and meritorious arguments against both the imposition and the reasonableness of the fees. Moreover, remanding this case would not have been futile. After proper analysis, the fee award would have been denied or if an award was made, it would have been substantially reduced to a reasonable amount. At a minimum, the District Court would have been required to provide, as it should, the legal basis for a fee award, if any. In addition, based on uncontroverted facts, a strong likelihood exists that petitioner Shantee Monga would not be subject to the entire liability, jointly and severally.

Where, as here, the *Hormel* standard cannot be met, an explanation by the First Circuit justifying a waiver is a fundamental requirement particularly under the circumstances of this case where the failure to oppose is inadvertent.

A review by the First Circuit would have also revealed that petitioners' case is similar in material respects to *Monaghan v. Hill*, 140 F.2d 31 (9th Cir.

1944) where the Ninth Circuit remanded explaining that circumstances showed that the trial court knew that the fee awarded would be questioned and appellant's failure to call the trial court's attention to its finding to give it an opportunity to reconsider its ruling could be excused. By analogy, there can be no doubt in the instant case the District Court knew that an award of $301,709.56 which is unreasonable on its face and which exceeds other fees approved by the **same** judge in comparable cases by as much as 1200% would be questioned. The Supreme Court itself has reviewed circumstances to see whether the district court was predisposed to ruling in favor of or against an objection before upholding a waiver. *See, e.g.*, *Boyd v. United States*, 271 U.S. 104, 108 (1925).

Under these circumstances, the First Circuit's presumption of waiver as basis to uphold a fee award which is unreasonable on its face is grossly unfair, and constitutes substantial injustice.

IV. THE FEE AWARD IS UNREASONABLE ON ITS FACE AND SUCH AN AWARD IS CONTRARY TO LAW

Without any supporting explanation, and under the circumstances of this case, it is conclusory for the District Court to find that an award of fees of $301,709.56 is reasonable. An unreasonable award violates the reasonable fee provisions of the legal authorities cited by respondents in support of their fee application.

As is evident from the face of the fee application, respondents made no effort to use "billing judgment". This violates the Supreme Court requirement that attorneys use such judgment and exclude from their

fees hours that are "excessive, redundant, or otherwise unnecessary" and that "[H]ours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority" (emphasis in the original), *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

Furthermore, the District Court's conclusion that fees awarded are reasonable does not even scale a threshold barrier under the twelve factors used for judging reasonableness of fees. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974). The federal appellate courts have required that the record must "demonstrate that the district court considered" the twelve factors. *Rivera v. City of Riverside*, 679 F.2d 795, 797 (9th Cir. 1982). The First Circuit has itself said that "the district court should apply the relevant *Johnson* criteria in arriving at a reasonable fee ... and ... care obviously should be taken to avoid excessive fees." *King v. Greenblatt*, 560 F.2d 1024, 1027 (1st Cir. 1977).

With respect to the rates, the Supreme Court has also held that reasonable fees "are to be calculated according to the prevailing market rate in the relevant community ..." *Blum v. Stenson*, 465 U.S., at 895. *See*, also *Keith v. Volpe*, 644 F.Supp. 1317, 1325 (D.C.Cal. 1986) where the court stated that "[I]n assessing hourly fees the court should rely on its prior fee orders, the rates awarded in comparable cases and the rates prevailing in the marketplace." None of this was undertaken by either the District Court or the First Circuit in the instant case.

The First Circuit as well as other Circuits have held that the district court should apply consistent standards in deciding what constitutes reasonable

fees. *See*, generally, *King*, *supra*, at 1026 (district court expected "to adhere carefully to certain general criteria"); *Hamilton v. Daley*, 777 F.2d 1207, 1212 (7th Cir. 1985) (it is district court's "duty ... to assure that consistent standards apply throughout the circuit"). A duty to independently review the time records to determine "the reasonableness of the hours spent and the hourly rates sought" has also been imposed in *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 529 (1st Cir. 1991). *See*, also, *U.S. v. Metropolitan Dist. Comm'n*, *supra*, at 17.

A plain reading of the District Court's endorsement, as well as a review of the fees awarded in prior cases by the same District Court judge show that in the instant case the District Court neither considered the prevailing market rate nor any of the other twelve factors in its determination and failed to apply consistent standards. In citing *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468 (9th Cir. 1992) the First Circuit said that the District Court is not required to make "written findings" on the twelve factors. However, *Richmark* does not absolve the District Court from its duty to weigh the twelve factors, it only relieves it from explicitly making "written findings" on these factors where no objection has been raised.

Had the District Court taken the relevant *Johnson* factors into account its own prior decisions would have revealed that the fees it approved in the case at bar were exorbitant. For example, in *Foster v. Mydas Associates, Inc.*, 943 F.2d 139 (1st Cir. 1991), a case comparable to petitioners' case (except for the fact that *Foster* went through a full jury trial) the prevailing defendants requested fees and expenses of

$34,347.48 with the **same** District Court judge awarding $26,000.00. Similarly in *Foley*, *supra*, a protracted police brutality case, the prevailing plaintiff requested $164,133 in fees for 1587.5 hours with the **same** District Court judge reducing the fee award to $110,000 despite lack of opposition by the fee targets. The hourly rates requested, and awarded, in *Foley* were $90-180 for attorneys and $40-60 for paralegals compared with rates of $125-325 (averaging $203) for attorneys and $70-85 (averaging $78) for paralegals in the instant case.

In affirming the District Court's reduced fee award the First Circuit in *Foley*, *supra*, at 21, stated that:

> [T]he rates that the district court employed were high - but not so pricey as to be unreasonable ... The counsel fees awarded were not unreasonable on their face ... [or] so exorbitant that it constituted an abuse of the trial court's discretion.

From the above it is obvious that despite the lack of opposition, the First Circuit made it known that it would have found an abuse of the trial court's discretion had the rates employed been "pricey"; or if "[T]he counsel fee awarded were [ ] unreasonable on their face"; or if the fee award was "exorbitant." In applying this standard, when compared with the "high" rates in *Foley*, the rates in the instant case are pricey, the fees are unreasonable on their face, and the fee award is exorbitant. Under these circumstances, the First Circuit's affirmation of the

award in the instant case is totally inconsistent with its own prior ruling.

Even if the matter regarding the twelve factors for judging reasonableness is put aside, respondents' fee of $77,964.00 for a summary judgment motion under the circumstances of this case is unconscionable as is the fee of $108,252.00 for pre-trial preparation. Moreover, the claims were neither novel nor difficult, and there was nothing remarkable about the pretrial proceedings that required expenditure of hundreds of hours at exorbitant rates. These two fees together account for about 70% of all of respondents' attorneys' fees, and exceed the combined awards in *Foster* and *Foley* by over $50,000. Unquestionably, such fees are unreasonable on their face.

The unreasonableness of these fees should be obvious to both the trial and appellate courts who are held to be experts on the subject matter of attorneys' fees. *Campbell v. Green*, 112 F.2d 143, 144 (5th Cir. 1940); *See*, also, *Twentieth Century-Fox F. Corp. v. Loew's, Inc.*, 194 F.2d 846, 859 (8th Cir. 1952), which held that it was the appellate court's duty to protect against "vicarious generosity" in the matter of attorney fees; and *St. Louis-San Francisco Ry. Co., v. Hurst*, 129 S.W.2d 970, 975 (1939), which held that courts should not lay aside their knowledge and allow "opinion of witnesses [to] be substituted for the judgment of the court."

When viewed in light of the above circumstances, respondents' allegation that petitioners greatly increased their fees by filing unnecessary motions is clearly baseless. The fact is that respondents spent only about 1% of its total of $301,709.56 in responding to these allegedly unnecessary motions. Respondents'

further allegation that petitioners were responsible for increasing their fees by resisting discovery again is not supported by their own fee application which shows that respondents spent only 6% of the total fees on **all** discovery related matters. The above two expenditures although computed at respondents' exorbitant rates, cannot show that petitioners' conduct was responsible for $301,709.56 fees incurred by respondents.

The above information obtained from respondents' fee application shows that respondents cannot justify how they could have reasonably expended over 1520 hours at rates of $125-325 per hour in defense of a lawsuit they described as meritless since the beginning. Obviously respondents' claim of so many hours must have involved a great deal of "learning time." See, generally, *DeJesus v. Banco Popular de Puerto Rico*, 951 F.2d 3, 4 (1st Cir. 1991). Therefore, it is not at all surprising that respondents' counsels have not, nor can they deny petitioners' assertion that the fees approved by the District Court are exorbitant and unreasonable on their face.

The same argument applies to respondents' costs of $19,602.06. There can be no question that respondents' costs are unreasonable on their face as demonstrated by the fact that the total **fees and costs** in the *Foster* case were only a few thousand dollars higher than respondents' **costs** alone in the instant case. Despite the protracted litigation in *Foley* the costs were a fraction of the costs awarded respondents in the instant case. Besides, the expenditures are completely unsupported as respondents have failed to provide any vouchers.

The above authorities show that the fees awarded respondents clearly violate the legal standards of reasonableness governing fee awards. The imposition of an exorbitant fee award is unjust and raises serious policy questions regarding fairness and the public reputation of judicial proceedings.

V. PLAIN ERROR RULE REQUIRES REMAND

An appellate court may also note a fundamental error not raised below. *Sibbach*, *supra*, at 15. The plain error rule protects the party prejudiced by the error and safeguards the integrity and public reputation of judicial proceedings. The First Circuit did not apply the plain error rule in stating:

> [W]here the Mongas failed to challenge the defendants' affidavit that the hourly rates charged were their normal and customary billing rates or to challenge the number of hours attested as spent on this litigation, we would be hard pressed to find plain error or abuse of discretion in a district court's acceptance of those uncontested allegations as well.

This reason is specious in that it merely identifies the error but fails to consider the substantial injustice resulting from the District Court's imposition of exorbitant fees of $301,709.56 and the public policy implications of imposing such fees. Public interest inherent in attorney fee awards is even more relevant here as civil rights statutes are involved.

Moreover, such an unreasonable award becomes a windfall for respondents' attorneys and is in direct conflict with the express intent of Congress. *See*, *Blum*, *supra*, at 897.

In view of these circumstances this case is well suited for remand under the plain error rule. A remand will result in minimal prejudice to respondents, if any, or to the administration of justice as their burden on remand is no greater than the burden they would have carried had petitioners opposed the fee application in the first place.

VI. IMPOSITION OF JOINT AND SEVERAL LIABILITY FOR THE ENTIRE AMOUNT AGAINST SHANTEE MONGA IS CONTRARY TO LAW

The District Court's apportionment of the total liability, jointly and severally, on Shantee Monga is legally impermissible and could be reviewed *de novo*. *See*, *e.g.*, *Richmark Corp.*, 959 F.2d, at 1473; *Taylor & Gaskin, Inc. v. Chris-Craft Industries*, 732 F.2d 1273, 1277 (6th Cir. 1984). The appellate courts have traditionally taken such a view especially for cases in equity, as is the instant case. *See, e.g.*, *Farmers Production Credit Ass'n v. McFarland*, 374 N.W.2d 654, 656 (Iowa 1985). The authority to review cases *de novo* is particularly appropriate where the issue not passed upon in the district court "does not affect ... the factual record", United States v. Gabriel, 625 F.2d 830, 833 (9th Cir. 1980) or the "record pertinent to resolution of this issue can be developed no further" and where declining to reach the issue "would result in a miscarriage of justice." *See*, *United States v. Krynicki*, 689 F.2d 289, 291, 292 (1st Cir. 1982); and *Hormel*, *supra*, at 557, 558.

An appellate review will also not prejudice respondents as they "cannot complain that appellate resolution of this issue will deprive [them] of an opportunity to introduce relevant evidence." *See*, *Krynicki*, *supra*, at 292 (there being no evidence to introduce - Shantee Monga's status as a non-lawyer under 42 U.S.C. Sec. 1988 and Mass. Gen. L. c. 231 Sec. 6F, and as a non-citizen under 42 U.S.C. Sec. 1983 is conceded to by respondents' counsels who also have personal knowledge of these matters).

The District Court's imposition of the entire liability on petitioner Shantee Monga, jointly and severally is a miscarriage of justice as she has been saddled with fees for which she is not liable as a matter of law.

VII. DISTRICT COURT FINDINGS ARE LEGALLY DEFICIENT

(a) Basis Of The Fee Award Must Be Indicated

In allowing the fee application in full, the District Court failed to state or otherwise indicate under what legal authority it had presumed to act. This violates the strict requirement enunciated in *Foster*, *supra*, at 141, by the First Circuit:

> We have said countless times before, and today reaffirm, that [a]ppellate review of the fee awards ordinarily requires that concrete findings be made and that the court below supply a clear explanation of the reasons undergirding a particular fee award.

Foster at 142 places this strict duty on the district court:

> [I]n order intelligently to review a fee award, the authority upon which the award is based must be known - or, at least knowable. It follows inexorably that, at a bare minimum, the trial court must indicate, either expressly or by unmistakable implication, which source of authority it is invoking when it makes a fee award ...

Other federal circuits have similarly held that when a party seeks award of attorney's fees under more than one legal authority, the court must indicate which authority it has invoked in granting such award. *See*, *Hoe v. Martin Marietta Corp.*, 845 F.2d 545, 549 (5th Cir. 1988); *Insurance Benefits Administrators, Inc. v. Martin*, 871 F.2d 1354, 1359 (7th Cir. 1989); *Jones v. Pittsburgh Nat'l Corp.*, 899 F.2d 1350, 1358 (3d Cir. 1990).

A simple endorsement by the District Court that the fees are reasonable in the total absence of the legal basis of the award violates the holdings in such cases. Moreover, such an unexplicated endorsement is additionally a deprivation of petitioners' due process rights. *See example.*, *Browning v. Kramer*, 931 F.2d 340, 345-346 (5th Cir. 1991).

(b) The District Court Conclusions Are Not Supported By Substantial Evidence

The evidence in the fee application is insubstantial and legally insufficient to support a conclusion that the fees and costs incurred by respondents' counsels are reasonable. Petitioners' failure to oppose respondents' fee request or challenge their attorney's affidavit alone cannot constitute the basis of the District Court's conclusion that under the circumstances of this case fees of $301,709.56 are reasonable fees. *See e.g.*, *Wojtkowski*, *supra*, at 130.

Respondents' claim that the total fees were based on counsels' "normal and customary billing rates" fails to cross a threshold barrier that the number of hours claimed are reasonable or that the billed rates are prevailing market rates. Respondents' failure "to produce satisfactory evidence - in addition to the attorney's own affidavits - that the requested rates are in line with those prevailing in the community ..." violates the evidentiary requirement in *Blum*, *supra*, at 896, n. 11. The federal appellate courts have also held that a fee target cannot be left to the mercy of the winner's lawyers or to the law firm's bill, *U.S. v. Metropolitan Dist. Comm'n*, 847 F.2d, at 17. The Ninth Circuit in *Sealey, Inc. v. Easy Living, Inc.*, 743 F.2d 1378, 1385 (9th Cir. 1984) has similarly held that it is necessary for a fee applicant to show "that the time actually spent was reasonably necessary." Furthermore, the District Court's wholesale adoption of respondents' fee application calls for a heightened scrutiny by an appellate court. *Sealey*, *supra*, at 1385.

Any evidence with regard to reasonableness of fees which can result in exorbitant fees is inherently questionable. Such evidence, even though

uncontradicted, should not be considered to dispose of this case. *See, e.g., United States v. Jobin*, 535 F.2d 154, 156 (1st Cir. 1976).

While the insufficiency of substantial evidence argument applies to all of the fees, its applicability is even stronger regarding respondents' bald application for fees of $69,287.50 for the period November 1988 through January 1990 as respondents have failed to supply billing rates and contemporaneous records for this period in clear violation of the requirements in *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 952 (1st Cir. 1984). *See*, also, *Weinberger*, 925 F.2d, at 527 which holds that the district court may not shirk its "responsibility to render a principled decision" where fee application is "bereft of contemporaneous time records." The same reasoning applies to costs as no vouchers are provided by respondents.

The District Court's award with no specific findings of fact or calculations also violates *Strand v. Herrick & Smith*, 489 F.2d 179,185 (Mass. 1986) where the Massachusetts Supreme Judicial Court reversed the trial court order imposing attorneys' fees under Mass.Gen.L. c.231 Sec. 6F notwithstanding that the issue had neither been briefed nor argued before the trial court. One of the grounds for reversal in *Strand* was that "the judge failed to comply with the explicit directives of M.G.L. c. 231 Sec. 6F, which requires that the judge include in his order specific facts and reasons for his findings, as well as the method by which the amount was computed."

VIII. CONSTITUTIONAL CONSIDERATIONS

Subsequent to filing their appellate brief, petitioners presented to the First Circuit a motion to consider constitutional issues regarding the excessiveness of the fees under the Excessive Penalties Clause of the Eighth Amendment and under the Due Process clause. The appellate court denied petitioners' motion. Accordingly, petitioners request this Court to consider the following issues based on the holding in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1937) that "[C]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights."

(a) Eighth Amendment

Although the Supreme Court has not directly ruled on the issue of excessive attorneys' fee sanctions as being violative of the Eighth Amendment, its opinion in *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, ___ U.S.___,109 S.Ct. 2909 (1989), is very instructive. After reviewing the history of the Eighth Amendment in *Browning-Ferris*, 109 S.Ct., at 2914, the Supreme Court stated that, "[T]o decide the instant case, however, we need not go so far as to hold that the Excessive Fines Clause applies just to criminal cases. Whatever the outer confines of the Clauses's reach may be, we now decide only that it does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded."

It is clear that the Supreme Court has left the door open to the applicability of protections afforded by the Eighth Amendment when an individual is subjected to

punitive civil sanction. In this context, the Supreme Court stated that "[O]ur Eighth Amendment jurisprudence has not been inflexible . . . Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave birth. This is particularly true of constitutions" *Browning-Ferris, Supra, supra*, at 2919. *See*, also *United States v. Halper*, 490 U.S. 435 (1989).

In view of the "underlying rationale of 'fee shifting' [being] punitive . . . because it vindicates the District Court's authority over a recalcitrant litigant (citation omitted)", *Chambers v. NASCO, INC.*,___ U.S. ___, 111 S.Ct. 2123, 2137 (1991), the principles enunciated in *Browning-Ferris* are highly relevant to the case at bar. The mere fact that the sanction goes to respondents, and not to the government, does not change its penal nature because it is primarily intended to punish petitioners. *See, St. Louis, I.M. & S.Ry.Co. v. Williams*, 251 U.S. 63, 40 S.Ct. 71, 73 (1919). The Excessive Fines Clause argument is further buttressed by the Massachusetts authority cited by Justices O'Connor and Stevens in *Browning-Ferris*, 109 S.Ct., at 2931, concurring in part and dissenting in part: "[T]he Massachusetts Supreme Judicial Court held that the word "fine" in a statute meant "forfeitures and *penalties recoverable in civil actions* (emphasis supplied), as well as pecuniary punishments inflicted by sentence" [citing *Hanscomb v. Russel*, 77 Mass. 373, 375 (1858).

Clearly a case involving an award of attorneys' fees of $301,709.56 which is unreasonable on its face and exceeds a contemporaneous award of $26,000 by twelve hundred percent in a comparable case in the

same jurisdiction involving the same judge (*Foster*, 943 F.2d 139) evokes the type of "new conditions and purposes" requiring review as violative of the Excessive Fines Clause of the Eighth Amendment as stated by the Supreme Court in *Browning-Ferris*.

(b) Due Process Considerations

In *Browning-Ferris*, ___ U.S. ___, 109 S.Ct., at 2921 the Supreme Court stated "that due process imposes some limits on jury award of punitive damages, and it is not disputed that a jury award may not be upheld if it was the product of bias or passion ... There is some authority in our opinions for the view that the Due Process Clause places outer limits on the size of civil damages award made pursuant to a statutory scheme (citation omitted)." Although the *Browning-Ferris* Court declined to reach a decision on due process ground as the issues were not preserved for appeal, clearly the Due Process Clause places outer limits on the size of punitive civil damages awarded by jury (and by corollary for punitive award of attorneys' fees by a judge acting as jury), so as to trigger a review of such an award. The award of $301,709.56 as reasonable fees under the facts of this case is the type of circumstance which places such an award well beyond the "outer limits" of the fee awards and is violative of petitioners' Due Process rights.

The record shows that the District Court's award of excessive fees against petitioners is unfair. As noted earlier, the District Court had hastily dismissed the instant case at a short motions hearing in June 1989, which dismissal was reversed by the First Circuit. In another housing discrimination lawsuit, *Foster*, *supra*, at 141, 143, the First Circuit similarly recognized the same District Court judge's "quick" grant of an

attorneys' fee motion against plaintiffs in that case and questioned whether the underlying case was the type of "egregious case that would warrant" the imposition of fees.

CONCLUSION

This case involves gross injustice and raises public interest issues of great importance as attorney's fee-shifting issues have become widespread. The First Circuit's decision in this case is in direct conflict with its own holdings in *Gabriele*, *Wojtkowski*, and *Foley* where the facts and law are remarkably similar. Moreover, in reviewing the instant case, the First Circuit improperly extended decisions of other Federal Circuits as well as those of this Court. Accordingly, this Court should grant certiorari.

Respectfully submitted,

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November 30, 1993

[NOT FOR PUBLICATION]

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 92-1478
SHANTEE MONGA, ET AL.,
Plaintiffs, Appellants,
v.
GLOVER LANDING CONDOMINIUM TRUST, ET AL
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Edward F. Harrington, U.S. District Judge]

Before

Selya, Cyr, and Boudin,
Circuit Judges

Shantee Monga and Dharam D. Monga on brief pro se.
Philip Curtis, Peter L. Ebb and Ropes & Gray on brief for appellees.

March 1, 1993

Per Curiam. The plaintiffs/appellants, Dharam and Shantee Monga, are attorneys representing themselves pro se. They are appealing an order of the district court awarding the defendant/appellees attorneys' fees and costs in the amount of $301,709.56. The fee award arose from a multiple count complaint filed by the Mongas, in 1988, against the condominium trust that manages the condominium complex where the Mongas are owner/occupants, and two individuals - an officer of that trust and the business manager of the complex. When their case was called to trial in February 1992, the district court denied their second request for a continuance and Mr. Monga stated that he was unready for trial. The Mongas' complaint was then dismissed for failure to prosecute. Similarly, we dismissed their appeal from that order of dismissal, in May 1992, for want of prosecution. Monga v. Glover Landing Condominium Trust, No. 92-1288 (1st Cir. May 27, 1992). Thus, what is presently before us is solely the appeal from the separate, and subsequent, order awarding fees and costs to the defendants.

The Mongas have filed an extensive brief contending, inter alia, that defendants' fee petition is excessive and inadequately supported and that the district court order granting the petition is too terse to stand upon review. The Mongas' appellate arguments fail to scale a threshold barrier of their own making, however. Although they had the opportunity, they failed to file any objection in the district court in response to the quite-detailed request for fees and

costs.[1] All the arguments vis-a-vis that petition that the Mongas are now making on appeal could have, and should have, been made to the district court. It is well settled and oft-repeated in this circuit that "issues not raised in the district court may not be raised for the first time on appeal." Calvary Holdings, Inc. v. Chandler, 948 F.2d 59, 64 (1st Cir. 1991). To the point is Blum v. Stenson, 465 U.S. 886, 892 n.5 (1984) (a party's failure to challenge in the district court the accuracy and reasonableness of the hours claimed in a fee petition or the facts asserted in the affidavits accompanying that petition waives her right to challenge on appeal the district court's determination that the number of hours billed was reasonable). See also Magicsilk Corp. of New Jersey v. Vinson, 924 F2d 123, 125 (7th Cir. 1991) (by failing to raise any objection to the fee petition in the district court, either prior to or after the court's ruling on that petition, fee target has waived right to argue the issue of fees on appeal).

The Mongas' complaint concerning the district court's otherwise unexplicated endorsement of the fee petition as reasonable fees and costs fares no better. Having failed to object to the petition prior to the district court's action, the Monga's further failed to ask for reconsideration and elucidation from the district court when it entered the order, the deficiencies of which they presently argue at length.

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1. Contrast Foster v. Mydas Assoc., Inc., 943 F.2d 139 (1st Cir. 1991). In Foster, the losing plaintiffs filed an opposition to the fee request and sought a hearing (which never materialized) in the district court. Id. at 141. They had properly preserved, therefore, a challenge to the district court's determination.

"[It] is black letter law that it is a party's first obligation to seek any relief that might fairly have been thought available in the district court before seeking it on appeal." Beaulieu v. United States I.R.S., 865 F.2d 1351, 1352 (1st Cir. 1989).

While we may dispense with the raise-or waive rule in an exceptional case to avoid a gross miscarriage of justice, United States v. Slade, 980 F.2d 27, 31 (1st Cir. 1992), we find no basis for the exercise of that power here. The Mongas offer no persuasive explanation for their failure to object below. They say that, after the court dismissed their case for failure to prosecute, they continued settlement negotiations[2] with the defendants and the defendants indicated that, contingent upon execution of a settlement agreement, they would withdraw the fee petition. No agreement executed by both Mongas was ever reached.

That the Mongas were hoping to resolve this matter by agreement does not excuse their failure to object to a pending fee petition of which they were aware. Throughout the four year odyssey of this litigation, the Mongas always promptly and aggressively opposed motions filed by the defendants, including a prior motion for attorneys' fees sought in connection with a discovery dispute between the parties.In the present instance, at the very least, they could have, and should have, informed the district court of the ongoing communications and asked for an extension of time to respond to the petition or to

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2. The defendants dispute the Mongas' characterization of the post-judgment communications as settlement "negotiations."

hold the petition in abeyance for a short period of time. To the extent that the Mongas' present explanation implies that they were misled during these post-judgment communications into believing that they need not object to the fee petition, nonetheless, there is no excuse for their failure to seek reconsideration from the district court after it granted the petition.

Even were we to excuse the Mongas' failure to object to fee petition, our resulting review of the district court's determination that the defendants' request represented reasonable fees and costs would necessarily be circumscribed by the procedural posture which the Mongas, themselves, have effectuated. The facts concerning the Mongas' conduct of this litigation, outlined in the defendants' fee petition, are unopposed and, in any event, are abundantly supported even by a superficial reading of the record. We mention but a few here to illustrate:

(1) The Mongas resisted discovery until enforced by an order of compulsion;

(2) They moved to reassign the case to another judge, which was denied; whereupon they moved for reconsideration, which was also denied;

(3) They moved to disqualify defendants' counsel, which was denied; whereupon they moved for reconsideration which was also denied;

(4) When the court granted the Mongas' request of March 26, 1991 to continue the trial then scheduled for April 1, 1991, they were ordered to pay the expenses of one of the defendants, who traveled to Boston in anticipation of, and in preparation for, the April 1st trial date.

Despite repeated requests for payment by the defendants and the court's denial of their motion for reconsideration of this order, those expenses were not paid until, in response to a motion for contempt filed by defendants, the court, on October 8, 1991, issued a further order directing the Mongas to pay the expenses by November 1, 1991 or risk dismissal of the case; And, finally,

(5) When the case was called for trial on Monday, February 3, 1992, Mr. Monga, appearing alone, requested another continuance, saying that his wife was sick and he was not ready to try the case. None of the dozens of proposed witnesses for the Mongas were present. According to Mr. Monga, his wife, would not be available that week, but he hoped she would be available in the next 30 days. When the court asked what was wrong with her, Mr. Monga replied that she was not in the hospital but, "I understand that she is depressed and has some injury." Although Mr. Monga and defendants' counsel had engaged in settlement negotiations that immediately preceding weekend, Mr. Monga had made no mention of his wife's illness.

We hasten to add that we are not suggesting that challenging discovery requests by an opposing party, filing certain motions, such as a motion to reassign the case or to disqualify opposing counsel, or moving to reconsider may not be, in ordinary circumstances, appropriate litigation options or are filed only at the risk of penalization. In these circumstances, however, we have no cause to review the merits of any of these motions filed by the Mongas. Their failure to prosecute their appeal from the order dismissing their complaint effectively forecloses any present argument that the district court erred in any of the underlying

rulings. We could find no error in a conclusion by a district court, with its firsthand experience with the parties, that an award of attorneys' fees was appropriate under the sources of authority propounded by the defendants. See, e.g., Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421-22 (1978) (a district court can award fees to prevailing defendant upon finding that the plaintiff's action was frivolous, unreasonable, vexatious, or without foundation, or that the plaintiff continued to litigate after it clearly became so)[3] ; Chambers v. NASCO, Inc., 111 S. Ct. 2123, 2133 (1991) (the assessment of attorney's fees to sanction a litigant for bad-faith conduct, such as delaying or disrupting litigation, is within a court's inherent power).

Similarly, where the Mongas failed to challenge the defendants' affidavit that the hourly rates charged were their normal and customary billing rates or to challenge the number of hours attested as spent on this litigation, we would be hard pressed to find plain error or abuse of discretion in a district court's acceptance of those uncontested allegations as well. See McDonald v. McCarthy, 966 F.2d 112, 118-19 (3d Cir. 1992) (where a party fails to contest the accuracy and reasonableness of the fees requested, it waives the right to do so and the district court is not free to disregard uncontested affidavits and reduce the award requested unless the order is based on the court's

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3. Christianburg involved attorney's fees pursuant to Title VII, but the standards for assessing fees under Title VII and 42 U.S.C. Sec. 1988 are identical. Hensley v. Eckerhart, 461 U.S. 424, 433 n.7 (1983).

personal knowledge as to the time expended on the case). While the district court's review is "to ensure that a fee award, overall is justified, and that the amount of the award comes within the realm of reasonableness, broadly defined[,]" it is not "the court's job either to do the target's homework or to take heroic measures aimed at salvaging the target from the predictable consequences of self-indulgent lassitude." Foley v. Lowell, 948 F2d 10, 20-21 (1st Cir. 1991).[4] The Mongas' present complaint that the district court's failure to articulate the basis for the award has placed them "at a considerable disadvantage to attack the reasonableness of the award" is disingenuous. They had the opportunity to attack the reasonableness of the award in the district court but rebuffed that opportunity by failing to object or seek reconsideration. Their transparent attempt to deflect blame for their present position onto the district court is unconvincing. In these circumstances, we cannot fault the district court's succinct granting of the request in full as reasonable fees and costs.

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4. In Foley, supra, at 19, a case involving public funding, we endorsed the right of the district court to review a prevailing plaintiff's fee petition and to award an amount reduced from that sought, despite a perfunctory objection by the losing municipality. Similarly, in Wojtkowski v. Cade, 725 F.2d 127, 130 (1st Cir. 1984), we held the authority of the district court to trim an inadequately supported fee request, despite the lack of opposition to the request from the losing municipal officers. Compare also Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518 (1st Cir. 1991), where we found the inclusion of a clear sailing agreement, ancillary to a class action settlement, required heightened judicial oversight.

See Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1482 (9th Cir. 1992) (where fee target does not object to the amount of fees claimed, the district court is not required to make written findings on the twelve factors which it otherwise ought to consider when calculating a fee award), cert. dismissed, 61 U.S.L.W. 3060, 3155 (U.S. Oct. 29, 1992).

The Mongas having failed to preserve for appellate review any issue with respect to the fee award, the district court order of March 13, 1992 is, therefore, affirmed.[5] Costs to defendants/appellees. We deny their request for attorneys' fees with respect to this appeal.

Affirmed.

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5. Although the Mongas' notice of appeal purported also to appeal the May 1, 1991 order directing them to pay the travel expenses of one of the defendants in connection with the continuance from the original trial date of April 1, 1991, that claim is barred from review.

First, the order complained of became final and appealable upon entry of the district court judgment dismissing the case for failure to prosecute. The Mongas let their appeal from that judgment lapse in this court and we dismissed the appeal for want of prosecution in May 1992. They cannot resurrect that claim in this appeal from the subsequent entry of judgment as to attorneys' fees. See, e.g., Hamilton v. Daley, 777 F.2d 1207, 1210 (7th Cir. 1985).

In any event, having exhausted the allowed 50 pages in their appellate brief, they attempt to raise this argument on page 50 solely by reference to, and purported incorporation of, record documents. As we have repeatedly said, "issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." United States v. Zannino, 895 F.2d 1, 17 (1st Cir.), cert. denied, 494 U.S. 1082 (1990).

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 92-1478

SHANTEE MONGA, ET AL.,
Plaintiffs, Appellants,
v.
GLOVER LANDING CONDOMINIUM TRUST, ET AL.,
Defendants, Appellees.

Before
Selya, Cyr, and Boudin,
Circuit Judges

ORDER OF COURT

Entered July 8, 1993

We have serious doubt that the appellants were as faultless as they claim in any alleged delay in their receipt of this court's opinion of March 1, 1993. In any event, we have considered their motion for reconsideration.

Treating the motion to file a late motion for reconsideration as a motion to recall mandate, it is granted. The motion for reconsideration is denied. Mandate is constructively recalled and reissued. The appellees' request for damages and double costs is denied.

The clerk is hereby instructed that, in addition to sending a copy of this order to the appellants at their address of record, he is to send a copy of this order to the appellants at the return address provided with these latest filings of the appellants:

D.Monga
c/o Betsy Wolf, Esq.
Perkins, Smith & Cohen
1 Federal Street
Boston, MA 02110

By the Court:

FRANCIS P. SCIGLIANO, Clerk

By: _____
Chief Deputy Clerk

(CC: Messrs. Curtis, Monga c/o Wolf, etc; Monga)

(2)

FILED
JAN 3 1994
OFFICE OF THE CLERK

No. 93-896

In the Supreme Court of the United States

OCTOBER TERM, 1993

SHANTEE MONGA AND DHARAM DEV MONGA,
PETITIONERS,

v.

GLOVER LANDING CONDOMINIUM TRUST, *et al.*,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether it was error for the First Circuit to uphold the District Court's award of attorney fees, where no opposition to these fees was made in the District Court, and where the arguments in opposition to the fee award were raised for the first time on appeal?

PARTIES

Petitioners and respondents are identified in the petition. Respondent Glover Landing Condominium Trust, a trust organized under Mass. Gen. L. c. 183A, has no parent company and no subsidiaries or affiliates.

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In the
Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-896

SHANTEE MONGA AND DHARAM DEV MONGA,
PETITIONERS,

v.

GLOVER LANDING CONDOMINIUM TRUST, *et al.*,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

I. STATEMENT OF THE CASE

Petitioners Shantee and Dharam D. Monga are a married couple who owned a condominium unit in the Glover Landing condominium complex located in Marblehead, Massachusetts. They brought suit in October, 1988 against Glover Landing Condominium Trust ("GLCT"), Marvin Frank and Mary Hession (collectively the "respondents" or the "defendants"), alleging various acts of housing discrimination under state and federal law, interference with the exercise of state- and federally-protected civil rights, breach of contract, breach of fiduciary duty, slander, interference with contractual relationships, and intentional infliction of emotional distress.

The parties engaged in discovery from approximately November, 1988 through January, 1991. In October, 1990 the District Court granted partial summary judgment to the respondents and dismissed six of the fourteen counts of the complaint. Thereafter, the Court set an initial trial date of April 1, 1991, which was continued at the Mongas' request until January 6, 1992.

The case was finally set for trial on February 3, 1992. Mr. Monga appeared in court on that date and requested a continuance, which the judge denied. Mrs. Monga did not appear in court at all on the date of trial. Mr. Monga announced himself unprepared to go forward, and the District Court dismissed the case, with prejudice, for failure to prosecute. Respondents thereupon filed a motion for attorney's fees, which the District Court granted on March 13, 1992, no opposition having been filed by the Mongas.

The Mongas filed separate appeals from the dismissal of their lawsuit and the award of attorney's fees. The appeal from the dismissal was, in turn, dismissed by the First Circuit for failure to prosecute (Docket No. 92-1288). The appeal from the award of attorney's fees was denied by the First Circuit on March 1, 1993, because the Mongas had failed to either oppose the fee motion or to seek reconsideration from the District Court following its award of fees. *See Monga v. Glover Landing Condominium Trust*, First Circuit Docket No. 92-1478 (March 1, 1993), *unpublished slip. op. (per curiam)*. A first motion for reconsideration (filed late by leave of the Court) was denied by the First Circuit on July 8, 1993. A second motion for reconsideration was denied by the First Circuit on October 7, 1993. Finally, on November 8, 1993, the Court of Appeals summarily denied the Mongas' so-called "supplement" to their second motion for reconsideration (treating this "supplement" as a third motion for reconsideration), in which the Mongas raised for the first time in any court the Fifth and Eighth Amendment arguments set forth, among others, in their petition to this Court.

II. REASONS FOR DENYING THE WRIT

The petition for writ of certiorari seeks to bring before this Court a decision by the First Circuit denying an appeal from a District Court fee award to which no opposition had been filed. The fee award came in response to a motion filed by respondents at the close of nearly four years of litigation, and was supported by 84 pages of attorney diaries and billing records, an affidavit of counsel certifying that the amounts shown were accurate and reflected customary rates, and a 12 page memorandum of law detailing the factual and legal bases justifying a fee award.

In declining to find any error by the District Court -- where the petitioners had wholly abjured from drawing the alleged grounds of error to the attention of the District judge (either by opposing the fee motion or by moving for reconsideration when the motion was allowed) -- the First Circuit applied well-settled principles of appellate procedure. In refusing to consider arguments made by petitioners for the first time on appeal (and in finding no error by the District Court judge in having failed expressly to address those arguments where they had never been addressed to him), the First Circuit followed the consistent teachings of this Court, and of every circuit, on a fundamental principle of trial and appellate practice which petitioners simply chose to ignore. The petition does not present any issue warranting review by this Court, and should be denied.

A. *Petitioners Have Waived Any Argument That the Fees Awarded Were Unreasonable, And The District Court's Allowance Of The Fee Petition Was In Any Event Without Error.*

The petition attacks a decision of the First Circuit which, far from providing any occasion for review by this Court, instead rests on one of the most basic and well-accepted rules of Federal jurisprudence: with limited exceptions, "issues not raised in the district court may not be raised for the first time on appeal."

Monga v. Glover Landing Condominium Trust, First Circuit No. 92-1478, *supra* (hereafter "First Circuit Op."), Petitioners' Appendix (hereafter "Pet. App.") at 3 (quoting *Calvary Holdings, Inc. v. Chandler*, 948 F.2d 59, 64 (1st Cir. 1991). *Accord, Thomas v. Arn*, 474 U.S. 140, 148 (1985), *reh'g denied*, 474 U.S. 111 (1986); *Kraebel v. New York City Dept. of Housing Preservation & Dev.*, 959 F.2d 395, 401 (2nd Cir.), *cert. denied*, 113 S. Ct. 326 (1992); *Heller v. United States*, 776 F.2d 92, 98 (3rd Cir. 1985), *cert. denied*, 476 U.S. 1105 (1986); *Bakker v. Grutman*, 942 F.2d 236, 242 (4th Cir. 1991); *In re Meyerland Co.*, 960 F.2d 512, 519 (5th Cir. 1992), *cert. denied, Meyerland Co. v. FDIC*, 113 S. Ct. 967 (1993); *Chandler v. Jones*, 813 F.2d 773, 77 (6th Cir. 1987); *Magicsilk Corp. of New Jersey v. Vinson*, 924 F.2d 123, 125 (7th Cir. 1991); *Empire State Bank v. Citizens State Bank*, 932 F.2d 1250, 1253 (8th Cir. 1991), *reh'g denied*, 1991 U.S. App. LEXIS 18, 486 (1991); *Bolker v. Commissioner*, 760 F.2d 1039, 1042 (9th Cir. 1985); *DeLoach v. Bevers*, 922 F.2d 618, 124 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 65 (1991); *Caban-Wheeler v. Elsea*, 904 F.2d 1549, 1557 (11th Cir. 1990).

As the First Circuit noted, "it is black letter law that it is a party's first obligation to seek any relief that might fairly have been thought available in the district court before seeking it on appeal." First Circuit Op., Pet. App. at 4 (quoting *Beaulieu v. United States I.R.S.*, 865 F.2d 1351, 1352 (1st Cir. 1989)). As the First Circuit also observed, this established principle of Federal practice has consistently been applied to the award of attorney's fees. *See Blum v. Stenson*, 465 U.S. 886, 892 n.5 (1984) (a party's failure to challenge in the district court the accuracy and reasonableness of the hours claimed in a fee petition or the facts asserted in the affidavits accompanying that petition waives her right to challenge on appeal the district court's determination that the number of hours billed was reasonable); *Magicsilk Corp of New Jersey v. Vinson, supra*, 924 F.2d at 125 (by failing to raise any objection to the fee petition in the district court either prior to or after the court's ruling on that petition, fee target has waived right to argue the issue of fees on appeal).

Having failed to either oppose the fee petition when it was filed or request reconsideration when the petition was allowed, the

Mongas cannot now complain of the decisions of either of the Courts below.[1]

To be sure, the rule precluding appellate review of matters not raised below may, as the First Circuit noted, be set aside by the appellate court *in its discretion* under limited and carefully circumscribed conditions. *See* First Circuit Op., Pet. App. at 4 ("We may dispense with the raise or waive rule in an exceptional case to avoid a gross miscarriage of justice"); *see also Singleton v. Wulff*, 428 U.S. 106, 121 ("The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases."). The use of this discretionary and narrow authority, which the petitioners apparently confuse with a binding duty, was in fact weighed in the present case by the First Circuit, which discerned "no basis for the exercise of that power here." First Circuit Op. *id.*

As the First Circuit found, the Mongas offered no legitimate excuse for their failure to oppose the fee filing, much less for their failure to seek reconsideration by the District Court when the fees were allowed. Moreover, as the Court of Appeals held, both the determination that fees were warranted under the relevant legal

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[1] The Mongas' claim that their waiver was "inadvertent" is both beside the point and without support in the record. A party need not specifically intend to waive an argument -- in contrast, for example, to a constitutional right -- in order for a waiver to occur. Moreover, as the First Circuit observed, the Mongas' assertion that they were somehow caught off guard by the District Court's allowance of a properly served fee petition is both implausible and, in any event, cannot explain or excuse their failure to seek reconsideration from the District judge, and to address to him (and thereby provide record evidence of) the factual bases which might support their present claim of "inadvertence." Having failed to do so, the Mongas have left a record which could not support a finding of inadvertence (even if such a finding were legally relevant, which it is not) and which suggests, if anything, a strategic decision to by-pass the District judge.

standards, and the approval in full of the fees requested, were amply supported by the unopposed record. Plainly, under these circumstances, the First Circuit cannot be found to have abused its discretion in declining to address the Mongas' untimely assignments of error. Just as plainly, and by stronger force, this case cannot provide any basis for this Court's consideration.[2]

The First Circuit's conclusion that the District Court in any event committed no error in its "succinct granting of the request in full as reasonable fees and costs", First Circuit Op., Pet. App. at 8, is equally unassailable. The District Court's forbearance to provide a detailed rationale for its allowance of the unopposed fee

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[2] The petitioners' citation to *Monaghan v. Hill*, 140 F.2d 31 (9th Cir. 1944), for the proposition that a party is not required to draw alleged errors to the attention of the trial court in the first instance is wholly without merit. In *Monaghan*, the Court of Appeals held that a party requesting fees, where the fee request was supported by record evidence and not opposed, was not barred from contesting on appeal the trial court's *reduction* of the fees requested, even though no exceptions had been taken to the findings of the motion judge, and even though no request for amendment was filed. *Monaghan* simply stands for the unremarkable proposition that, where a proper evidentiary foundation has been laid, a party need not--in order to preserve the point for appeal--object to findings which are contrary to the uncontradicted evidence. *Monaghan* is of no help to the petitioners, who failed to put in any evidence in support of their present opposition, or to suggest to the District Court any way in which the legal arguments and evidence supporting the fee application were wanting.

Nor does *Hormel v. Helvering*, 312 U.S. 552 (1941), advance petitioners' cause. In *Hormel*, this Court merely recognized the discretionary *authority* of an appellate court to review issues not raised below "in exceptional cases or particular circumstances," *id.* at 557, and found no abuse of that authority on the facts of that case. As noted above, the First Circuit was fully aware of its authority in this respect, and appropriately found no circumstances warranting its exercise.

application gave rise to no occasion for appellate correction. *See Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1482 (9th Cir.), *cert. dismissed*, 113 S. Ct. 454 (1992) (where fee target does not object to the amount of fees claimed, district court not required to make detailed findings). Having failed to suggest to the District judge any aspect in which the fee application might be deficient, and having failed to request further elucidation from the District Court upon its allowance of the fee petition in full as "reasonable," the Mongas received from the District Court all that to which they were entitled.[3]

Moreover, notwithstanding its holding that the Mongas had waived any right to challenge the District Court's fee award, the First Circuit nonetheless *did* consider the substance of their claims. The First Circuit could find no abuse of discretion in the District Court's determination that the fee petition was both warranted ("the facts concerning the Mongas' conduct of this litigation, outlined in the defendants' fee petition, are unopposed and, in any event, are abundantly supported even by a superficial reading of the record"; First Circuit App., Pet. App. at 5) and in an amount "represent[ing] reasonable fees and costs." *Id.* at 5-7. Indeed, as the First Circuit observed, the trial judge would have

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[3] The petition goes to great length and detail in attacking the fee request as "unreasonable on its face" because, it is claimed, the Mongas' bad conduct directly caused only a portion of the costs incurred. See Petition at 6-9. This attack proceeds from the mistaken assumption that an award of fees, in response to a pattern of vexatious conduct (such as the record shows and as the First Circuit found to exist in the present case) or otherwise groundless litigation (as the record also demonstrates here), must be limited to costs specifically incurred in defense of particular frivolous acts, and may not extend to the whole costs of defense. As this Court has just recently held, however, such is not the law. *See, e.g., Chambers v. NASCO, Inc.*, 111 S. Ct. 2123, 2139 (1991). As well, the Mongas' detailed analysis hardly shows the petition to have been unreasonable "on its face" and is, instead, precisely the type of argument which ought to have been addressed to the District Court when the petition was filed.

exceeded his authority had he disregarded the uncontested evidence as to the accuracy and reasonableness of the fees requested, unless based on his personal knowledge as to the actual time expended on the case. *Id.* at 7-8, citing *McDonald v. McCarthy*, 966 F.2d 112, 118-19 (3rd Cir. 1992).

Contrary to the impression given by the petition, the Court of Appeals properly recognized the existence of the limited *power* of a District judge, exercising the particularly broad discretion afforded him in fee determinations, to alter an uncontested fee request, or a request contested in only a perfunctory manner.[4] No decision of the First Circuit, or of any other Court of Appeals,

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[4] *Wojtkowski v. Cade*, 725 F.2d 127 (1st Cir. 1984), and *Foley v. Lowell*, 948 F.2d 10 (1st Cir. 1991), cited by the First Circuit, are cases of this variety. In both cases, the First Circuit acknowledged that it was within the District Court's discretion to reduce fee petitions; in neither case did the Court of Appeals suggest that it would have been an abuse of discretion for the District Court to have allowed the petitions in full or that the usual "raise or waive" limitations would not have applied to appellate review of such an allowance. Accordingly, neither *Wojtkowski nor Foley* supports the petitioners' assertion of a "conflict" within the First Circuit on this point. Indeed, *Foley* itself contains the strong caution that it is not "the court's job either to do the [fee] target's homework or to take heroic measures at saving the target from the predictable consequences of self-indulgent lassitude", Foley, supra at 20-21, a caution seemingly ignored by petitioners here.

Nor does the petitioners' citation to *Gabriele v. Southworth*, 712 F.2d 1505 (1st Cir. 1983), add any support to the claim of an intra-circuit "split". In *Gabriele*, the First Circuit undertook a particularly searching review of a fee award where that award had been hotly contested below, and where the fee target had suggested some impropriety in the District Court judge's approval of fees sought by his former law clerk. No suggestion of waiver appears to have been made before the First Circuit, nor does the opinion in that case give any hint that the waiver issue was considered by the Court on its own.

however, can fairly be read to suggest that the District Court is *required* to make such alterations *sua sponte*, or abuses its discretion when it declines to do so. Here again, as with the narrow license of an appellate court to review issues not preserved at trial, the petition confuses limited discretionary judicial *power* with some supposed judicial *obligation*. No such obligation, however, exists. Accordingly, as the First Circuit observed, the Mongas' "transparent attempt to deflect blame for their present position onto the district court is unconvincing." First Circuit Op., Pet. App. at 8.[5]

The petitioners raise a separate point (made, as with all their objections, for the first time only on appeal) concerning the imposition of joint and several liability. In addition to suffering the same procedural infirmities as its companion allegations, this argument bears the further defect of contradicting the Mongas' own prior pleadings. In urging that joint and several liability cannot be established, the petitioners point out that, as a non-citizen, Shantee Monga could not ultimately have maintained her claims under 42 U.S.C. § 1982, and assert that fee-shifting would, as to Ms. Monga, therefore be inappropriate. That Ms. Monga's asserted claims under § 1982 were from the outset spurious, as the Mongas now concede, can hardly provide any basis for the avoidance of fees designed to deter precisely such frivolous

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[5] As to the suggestion that respondents have "nowhere . . . claimed that the fees sought were reasonable," Petition at 5, this is on par with faulting a party who has sworn under oath that he did everything he could do to avoid an accident, but has nowhere testified that he was not negligent. A party's disinclination to assert in an affidavit the ultimate conclusion to be determined by the Court (*viz.*, that the hours expended and the fees charged were "reasonable"), while setting forth all of the facts necessary for that determination (and citing to the Court those statutes which would permit an award of "reasonable" fees and costs) is simply a recognition of the appropriate boundary between facts which may be sworn to by a party, and conclusions of law which only the Court may deliver.

claims. Common sense, of course, dictates precisely the opposite result.

Similarly, the suggestion that Ms. Monga was not a party to any contract, and should therefore have been excused from fee liability related to the Mongas' contract claims, flies in the face of petitioners' complaint alleging damages on behalf of both plaintiffs under a contract theory. Only slightly less incredible is the apparent suggestion that Ms. Monga's status as a non-lawyer should free her from liability under fee-shifting statutes which hold to financial account the parties to frivolous litigation, and not their legal counsel.

B. Petitioners' Claims Under The Excessive Fines And Due Process Clauses Of The United States Constitution Have Been Waived In Each Of the Courts Below, And Are Without Merit In Any Event.

The petition's suggestion that an award of attorney's fees may violate the Eighth Amendment's Excessive Fines Clause or the Due Process Clause of The Fifth Amendment fares no better than its attack on the reasonableness of the award. The possibility of an Excessive Fines or Due Process claim was never raised before the District Court, and these claims are therefore waived. Contrary to the petitioners' suggestion, purportedly buttressed by cases involving the standard for determining a waiver of a criminal defendant's constitutional *rights*, *see Johnson v. Zerbst*, 304 U.S. 458 (1938) (right to counsel), no more lenient rule than that discussed above applies to the loss, through procedural default, of a constitutionally-based defense or objection. *See, e.g.*, *Doucette v. Ives*, 947 F.2d 21, 30-31 (1st Cir. 1991) (constitutional argument not made in district court waived for purposes of appeal); *Cecos Int'l Inc. v. Jorling*, 895 F.2d 66, 70 (2nd Cir. 1990) (same); *Heller, supra*, 776 F.2d at 98 (3rd Cir.) (same); *Collins v. Trinity Indus. Inc.*, 861 F.2d 1364, 1365-66 (5th Cir. 1988) (same); *U.S. v. National Steel Corp.*, 767 F.2d 1176, 1182 (6th Cir. 1985) (same); *Beard v. J.I. Case Company*, 823 F.2d 1095, 1104 n. 9 (7th Cir. 1987) (same); *MSM Farms Inc. v. Spire*, 927 F.2d 330, 334-335 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 65 (1991) (same); *Benigni v. City of Hemet*, 879 F.2d 473, 477 (9th

Cir. 1988), *reh'g denied*, 882 F.2d 356 (1989) (same); *Long v. Shillinger*, 927 F.2d 525, 528 (10th Cir. 1991) (same).

Indeed, the Mongas did not even raise these constitutional claims before the Court of Appeals until their *third* motion for reconsideration, thereby waiving these points in the First Circuit as well. *See Costo v. United States*, 922 F.2d 302, 303 (6th Cir. 1990) (arguments not raised in appellate brief may not be raised for the first time in petition for reconsideration); *United States v. Lewis*, 798 F.2d 1250 (9th Cir. 1986), *cert. denied*, 489 U.S. 1032 (1989) (declining to consider argument in petition for rehearing where not raised in original appeal brief); *Sierra Club v. Hodel*, 848 F.2d 1068, 1100-01 (10th Cir. 1988) ("Petitions for rehearing under Fed. R. App. P. 40(a) are permitted to enable parties to notify, and to correct, errors of fact or law on the issues already presented; they are not meant to permit parties to assert new grounds for relief."). Accordingly, there could have been no error in the First Circuit's summary denial of the third motion for reconsideration, and that denial cannot serve as the basis for review by this Court. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970) (general rule that where issues were neither raised before nor considered by Court of Appeals, Supreme Court will not consider them); *Springfield v. Kibbe*, 480 U.S. 257, 259 (1987), *reh'g denied*, 481 U.S. 1033 (1987) (same); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (same).

Moreover, even if the Mongas had properly preserved their newly-enunciated constitutional claims, those claims are manifestly without merit. As to the Excessive Fines argument, the Mongas have cited no case, and respondents' research has discovered none to exist, suggesting that an award of attorney's fees, much less an award of fees to a non-governmental party to a civil suit, implicates the Eighth Amendment at all. Indeed, the case primarily relied on by the petitioners, *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), points to precisely the opposite conclusion. Even if attorney's fees were viewed, as the Mongas suggest they should be, as a form of judicially-imposed punishment, the Court in *Browning-Ferris* expressly rejected the application of the Eighth Amendment to this sort of penalty:

> The fact that punitive damages are imposed through the aegis of courts and serve to advance governmental interests is insufficient to support the step petitioners ask us to take. While we agree with petitioners that punitive damages advance the interests of punishment and deterrence, which are also among the interests advanced by the criminal law, we fail to see how this overlap requires us to apply the Excessive Fines Clause in a case between private parties . . . We shall not ignore the language of the Excessive Fines Clause, or its history, or the theory on which it is based, in order to apply it to punitive damages.

Id. at 275-76. Further, the Mongas have failed to suggest how an award of "reasonable" attorney's fees, recompensing the prevailing party for its actual damages incurred through vexatious litigation, could ever satisfy the element of "excessiveness" which is requisite to any Eighth Amendment claim (and, having forfeited through inaction their right to attack the reasonableness of the fees awarded in the present case, the Mongas cannot resurrect a complaint of unreasonableness in the guise of a constitutional claim).

Similarly, as to their untimely claim under the Due Process Clause of the Fifth Amendment, the Mongas have cited no case suggesting that an award of reasonable attorney's fees might raise the specter of "punitive damages that 'run wild.'" *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991). To the contrary, the standards for the award of fees, the procedural safeguards attending the fee process, and the concrete and uncontested evidence presented to the District Court of petitioners' vexatious conduct and of the actual litigation costs reasonably incurred by respondents in the present case (on the basis of which the fee petition was allowed) all underscore the constitutional "reasonableness" of the "reasonable attorney's fee" award. That the Mongas failed properly to avail themselves of those procedures, or to suggest in the appropriate forum why the applicable standards might not have been met, leaves them no more ground to complain of constitutional unreasonableness than is available to them in attacking, well after the fact, the fee award itself.

C. Enforcement Of The Fee Award Is Not Contrary To Any Public Policy.

With no support for their position in either the law or the facts, the petitioners seek refuge in allusions to public policy, suggesting that the allowance of the fee award in this case somehow involves some undefined "public interest." Clearly, however, no public interest can be offended by the award of fees necessitated by the defense of frivolous litigation. Nor is public policy undermined by requiring plaintiffs here to observe basic rules of Federal practice, or to risk the consequences of their knowing failure to do so. Rather, public policy requires that the pursuit of frivolous litigation carry some consequences, and that parties not be permitted to flout with impunity and without excuse the requirements of contemporaneous objection. *See Thomas v. Arn, supra*, 474 U.S. at 147-148 (upholding rule that objections not made to magistrate's finding are waived, and stating that the rule, "by precluding appellate review of any issue not contained in objections, prevents a litigant from 'sandbagging' the district judge by failing to object and then appealing.").

In sum, the petition presents no matter of law on which the circuits are at odds, and no issue, either of law or policy, of such general importance as to otherwise merit this Court's review.

III. CONCLUSION

For all the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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Dated: December 31, 1993

SUPREME COURT, U.S.
FILED
JAN 19 1994
OFFICE OF THE CLERK

No. 93-896

SUPREME COURT OF THE UNITED STATES
October Term 1993

SHANTEE MONGA, and,
DHARAM DEV MONGA
Petitioners

v.

GLOVER LANDING CONDOMINIUM TRUST;
MARVIN FRANK, individually and as Chairman of
the Board of Governors; MARY E. HESSION,
individually and as Manager,
Respondents

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

REPLY TO BRIEF IN OPPOSITION

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...

ERRATA

Petitioners submit the following short list of errors noted in their Petition and apologize for any inconvenience this may have caused the Court:

Page 2 para. 4 Replace March 13, 1993 with March 1, 1993
Page 24 para. 1 Replace Sec. 1983 with Sec. 1982
Page 27 para. 3 Replace 489 F.2d with 489 N.E.2d

I. INTRODUCTION

Respondents have mischaracterized the facts of the district court's dismissal. The record shows that petitioners were prepared for trial as early as January 6, 1992 when they appeared in court on the first scheduled trial date. At the district court's own initiative, trial was rescheduled for February 3, 1992. On February 3, 1992 Mr. Monga appeared but could not proceed as his key material witness was not present to testify due to medical reasons. The district court dismissed the lawsuit after it denied Mr. Monga's oral motion to continue the trial for a short time until the witness could return to Boston to testify.

Another distortion is respondents' attempt to create the impression that the fee application is adequately supported. A cursory review shows that the fee application is deficient as a matter of law. For example, respondents failed to provide a single voucher for $19,602.06 they claim to incur in costs.

Claiming non availability, respondents also failed to provide contemporaneous records or billing summaries for the fifteen (15) month period from November 1988 through January 1991. Although respondents allege to have incurred $69,287.50 in fees for this period, neither the number of hours nor the hourly rates were furnished. Names of the lawyers and dates on which services were rendered are absent. Description of the tasks performed is missing. See, also, Petition at 6-9.

Furthermore, respondents have misstated petitioners' position regarding the unreasonableness of the fees. See, Opposition Brief at 7 n. 3. Petitioners do

not contend, as respondents erroneously allege, that an award of fees must be limited to costs specifically incurred in defense of particular acts and may not extend to the whole cost of defense for it to be reasonable. As respondents are fully aware, petitioners contend that the total fees and costs of $301,709.56 are unreasonable on their face because of respondents' numerous excesses, among them, 1) exorbitant amounts expended on their summary judgment motion; 2) excessive amounts expended on trial preparation; 3) exorbitant attorney and paralegal rates charged; and 4) excessive costs in general. See, Petition at 6-9 and 16-22.

Although petitioners addressed at length the unreasonableness of fees, respondents have failed to deny this claim. Respondents have also failed to deny petitioners' assertion that a substantial portion of the fee award actually goes into respondents' counsels' pockets as a windfall and not to the respondents who were never billed the total fees and costs of $301,709.56. See, Petition at 9.

II. REASONS FOR GRANTING THE WRIT

A. Respondents Have Failed To Show That Petitioners Waived Their Rights.

Respondents question petitioners' claim that failure to raise issues in the district court was due to inadvertence or oversight. Respondents speculate that petitioners' failure to seek relief in the district court must have been a by-pass strategy. See, Opposition Brief at 5, n. 1. Respondents' self-serving inference is counterintuitive. Common sense shows that petitioners had nothing to gain from by-passing the district court and gambling on having a judgment in

excess of $300,000.00 rendered against them.[1] All actions undertaken by petitioners since the district court's March 1992 order for fees (including prompt filings of the notice of appeal and the appeals brief containing meritorious arguments) support petitioners' claim that, being inexperienced pro se petitioners, their failure to oppose was inadvertent and was not interposed for delay. Without citing any authority, respondents additionally suggest that inadvertence is not legally relevant. By resorting to conjecture, respondents have completely ignored cases cited in the Petition. *See, e.g., Johnson v. United States*, 318 U.S. 189, 200 (1943) which supports the view that regarding waiver, inadvertence or oversight are important considerations. Respondents' further argument that the record does not support a finding of inadvertence is also misplaced. The record is completely silent in this regard and offers no basis for the First Circuit's presumption of waiver under the circumstances. The court's presumption of waiver on a silent record resulting in deprivation of important fundamental rights is in conflict with the Supreme Court's opinion in *Carnley v. Cochran*, 369 U.S. 506, 516 (1961).

On the one hand respondents have accepted petitioners' argument that the district court's allowance of their fee application in full without

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1. In their appellate brief, petitioners devoted over nineteen (19) pages of factual and legal arguments showing petitioners' lawsuit was meritorious and that the fee award was improper. Additional fifteen (15) pages supported the argument that the fees were grossly excessive. These arguments remain uncontroverted and are clearly meritorious. A by-pass under these circumstances is even less plausible.

indicating the legal authority is in conflict with *Foster v. Mydas Associates, Inc.*, 943 F.2d 139, 141-143 (1st Cir. 1991). See, Petition at 24-25. On the other hand respondents argue that there is no intra-circuit conflict or conflict between circuits. Offering no support for their position, respondents instead strain to distinguish the following three First Circuit cases: *Gabriele v. Southworth*, 712 F.2d 1505, 1507 (1st Cir. 1983); *Wojtkowski v. Cade*, 725 F.2d 127, 130 (1st Cir. 1984); and *Foley v. Lowell*, 948 F.2d 10, 19 (1st Cir. 1991). Respondents contend that these decisions cannot be read to suggest that the district court is required to alter an unopposed fee request. See, Opposition Brief at 8-9. Respondents' argument is untenable. The district court is required to award only reasonable fees. If the fee application is excessive, the district court must trim it as illustrated by these three cases which encompass facts very similar, if not identical, to petitioners' case.

Inspite of the remarkable similarities, and notwithstanding that the fee award against petitioners exceeds the combined fees in all of the above three cases by an amount well in excess of $100,000.00, the First Circuit ignored its own precedence, presumed waiver, and cited a conflicting Third Circuit decision in *McDonald v. McCarthy*, 966 F.2d 112 (3rd Cir. 1992) to support its position. *McDonald* is also in conflict with *Strand v. Herrick and Smith*, 489 N.E 2d 179, 185 (Mass. 1986), a Massachusetts Supreme Judicial Court decision regarding award of fees under the Massachusetts Fee Statute. See, Petition at 27. Such departure from the usual course of proceedings calls for an exercise of this Court's supervision.

That the district court has discretion to award only reasonable fees is clear from the plain language of the fee shifting statutes and the rule under which respondents sought fees. In order to exercise sound discretion and award reasonable fees, the district court (and by corollary the appellate court) has "the duty ... to assure that consistent standards apply throughout the circuit." *Hamilton v. Daley*, 777 F.2d at 1212. *Also, see, U.S. v. Metropolitan Dist. Comm'n*, 847 F.2d at 17 where it was stated that "the court has a right - indeed, a duty - to see whether counsel substantially exceeded the bounds of reasonable effort ... If so, the court must act."

The presumption of an absolute waiver in the instant case shows that the First Circuit has treated the post trial fee motion as if it were an ordinary triable matter subject to the traditional adversial process, an approach which flies squarely in the face of the First Circuit's opinions in *Gabriele, Wojtkowski and Foley*. For example, in *Gabriele, supra*, at 1507 the First Circuit held that "fee determinations are not resolvable solely under adversary system procedures ... [and that] claims are subject not only to testing by adversaries but to the independent review of a court."

In their effort to justify the First Circuit's presumption of waiver, respondents rely on inapplicable cases which deal primarily with trial settings. Such cases are distinguishable as this case involves a post trial fee motion. For example, *Thomas v. Arn*, 474 U.S. 140, 148 (1985), a case cited by respondents, involves a statutory waiver in a criminal trial and has no relationship with the judicially constructed waiver where, as here, presumption of waiver is subject to abuse of discretion standards.

In their tenuous effort to buttress the district court's allowance of their fee motion in full, respondents also cite the Third Circuit decision in *McDonald, supra*. Despite First Circuit precedence in the same matter, respondents insist that the Third Circuit's decision in *McDonald* should be the law in this First Circuit case. See, Opposition Brief at 7-8. *McDonald* is in direct conflict with the decisions of the First Circuit and the Massachusetts Judicial Court. It is important that this Court resolve these conflicts to settle this area of law. Such a resolution will also be consistent with petitioners' right to due process and will prevent injustice inherent in the imposition of unreasonable penalties.

B. The First Circuit's Decision And The District Court's Award Violate Supreme Court Decisions

Not only is the First Circuit's decision in the instant case in conflict with *Carnley, supra*, and its own prior decisions, but the district court's fee sanction is also violative of *Chambers v. NASCO, Inc.*, 111 S. Ct. 2123 (1991), a case relied on by respondents. Unfortunately for respondents, *Chambers* is readily distinguishable as a matter of fact; as a matter of law, it actually undercuts their position. *Chambers* explicitly requires that a specific finding of bad faith be made by the district court prior to imposing sanctions under its inherent power and then only in circumstances where the statute or the rules are not otherwise "up to the task". *Id.*, at 2136. *See*, also, *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1977) which requires the district court to make an explicit finding that the lawsuit was "frivolous, unreasonable, or without foundation ..."

The record shows that the district court made no finding whatsoever merely stating in its footnote endorsement that "[N]o opposition being filed, the court grants defendants' motion as reasonable fees and costs." Respondents have not, and cannot show that the district court's footnote order comes even remotely close to meeting the *Chambers* and *Christianburg* standards. In fact, the district court's failure to even indicate whether it was sanctioning petitioners under its inherent power deprived petitioners the basic right to due process mandated by *Chambers*. Also, by failing to make such findings and by failing to indicate the authority under which it granted respondents' fee application in full, the district court totally ignored the Supreme Court's requirement in *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1982) with respect to findings. It also ignored the First Circuit's mandate in *Foster*, 943 F.2d, at 141-143 with respect to the legal authority used to grant fees.

Respondents' argument that they have no obligation to support their claim that the fees requested meet the reasonableness standard is contrary to the law enunciated by the Supreme Court. In *Blum v. Stenson*, 465 U.S. 886, 896 n. 11 (1983) it was noted that federal courts "required prevailing attorneys to justify the reasonableness of the requested rate or rates" by producing "satisfactory evidence - in addition to the attorney's own affidavits - that the requested rates" are reasonable. Respondents did nothing to show that the rates are reasonable. They simply stated that the rates charged are their customary billing rates. This does not even come close to meeting the reasonableness requirement.

C. Public Policy Is An Important Consideration In Awarding Fees

Respondents assert that petitioners' public policy arguments are not supported by law or facts. Respondents' position is totally incorrect. The underlying rationale in fee shifting statutes show that public policy is an important consideration in awarding attorneys' fees.

Public policy becomes even more important where, as here, the fee award is unjustified and is unreasonable on its face. In fact, the award of $301,709.56 has been so arbitrarily granted that it even includes fees which had previously been denied by both the First Circuit and the district court.[2] Had the First Circuit considered petitioners' meritorious arguments, as it should have, it would have recognized that respondents' fee petition includes fees which were previously denied by the same two courts. Respondents are collaterally estopped from seeking such fees and the district court's award of such fees is subject to res judicata. It is incomprehensible to deny existence of policy interest when a substantial portion of the fee award actually goes into counsels' pockets as a windfall and not to the litigants. See, Petition at 9.

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2. Respondents had sought fees for opposing petitioners' successful appeal of the June 1989 dismissal of the lawsuit by the same district court. Said request was denied by both the First Circuit and the district court in early 1991. See Petition at 3.

D. Petitioners' Lawsuit Is Meritorious. No Finding To The Contrary Has Been Made

Although it is uncontroverted that the lower court has in effect "defaulted" petitioners, respondents have strained to create the impression that there were findings by the court of "vexatious conduct" and "groundless litigation" on petitioners' part. See, Opposition Brief at 7, n.3. No such findings were ever made on the merits. The record shows that the district court made no findings whatsoever before awarding fees and that the appellate court neither considered petitioners' meritorious arguments nor the facts refuting respondents' bald allegations. In effect, petitioners have been precluded from their day in court to argue the merits of their opposition to the fees. The First Circuit's opinion shows that the court presumed absolute waiver, simply paraphrased respondents' unsubstantiated allegations in the fee application, and failed to take into consideration any arguments in petitioners' appellate brief. See Pet.App.at 6-7.

The record shows that petitioners' lawsuit was well grounded in fact and in law. Not only had petitioners established a prima facie case but they also successfully survived a summary judgment motion. Furthermore, in accordance with *Hamilton v. Daley*, *infra*, based on the time and effort respondents' counsels claim to have expended in defending said lawsuit, petitioners' lawsuit cannot be baseless as alleged. *See*, *Hamilton v. Daley*, 777 F.2d 1207, 1214 n.7 (7th Cir. 1985) where the court stated that "Indeed the more time a defendant spends in defending a Section 1983 case, the less likely it is that the case is frivolous ...".

As to the unreasonableness of the fees, the First Circuit failed to even conduct a threshold inquiry regarding petitioners' well substantiated and uncontradicted assertion that the fees awarded by the district court are unreasonable on their face.

E. Respondents Have Failed To Show That The First Circuit Did Not Abuse Its Discretion In Presuming Waiver Regarding Joint And Several Liability

Contrary to respondents' statements, the record is clear that the First Circuit did not review, among others, petitioners' objections to the district court's imposition of liability on Ms. Monga for the entire fees. Ms. Monga is neither a lawyer nor a citizen of the United States and cannot be legally responsible for such statutory fees. See, Petition at 23-24. The First Circuit's refusal to review this claim which is purely legal in nature is violative of *Furtado v. Bishop*, 635 F.2d 915, 920 (1st Cir. 1980) where the court articulated the standard of review to include errors of law (aside from abuse of discretion) committed by a district court.

In an attempt to distract this Court's attention from the merits of the issues presented by petitioners, respondents introduce irrelevant matter regarding breach of contract which is not in the record before this Court. See, Opposition Brief at 10. As can readily be ascertained from the Petition, no argument or facts have been advanced before this Court bearing on Ms. Monga's claims under a contract theory. Had respondents thought that Ms. Monga's damages under the contract claims were spurious, which Ms. Monga denies, they could have filed a simple motion to dismiss or included this claim in their summary

judgment motion on which they expended $77,964.00. Having failed to take this action, they cannot now be awarded fees in defending these claims[3]. As the Seventh Circuit made it clear in *Hamilton v. Daley*, 777 F.2d at 1214, "a defendant should pay its own fees in a Section 1983 suit that are as much a result of its own inaction as the plaintiff's unreasonableness."

F. Constitutional Considerations

Respondents erroneously claim in their Opposition Brief at 11 that petitioners "did not even raise these constitutional claims before the Court of Appeals until their *third* motion for reconsideration." In their appellate brief petitioners did present arguments relating to various issues of fundamental procedural fairness, the grossly excessive nature of the fees, and due process elements inherent in the imposition of excessive fees and failure to indicate the legal authority. These arguments amply address constitutional issues. Respondents are fully aware that the issues argued by the pro se petitioners in their appellate brief were remarkably similar to language regarding constitutional claims in their motion for reconsideration.

In response to petitioners' assertion that the $301,709.56 fee sanction violates the Excessive Fines Clause of the Eighth Amendment and the Due Process Clause, respondents advance the argument that attorneys' fees which merely recompense a prevailing defendant in a civil rights lawsuit for its actual litigation costs reasonably incurred cannot satisfy the

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3. The same argument applies to respondents' baseless allegation regarding Ms. Monga under 42 U.S.C. Sec. 1982.

constitutional element of "excessiveness". See Opposition Brief at 12. Unfortunately for respondents, the legal standard of reasonableness of fees is not governed by what the lawyers claim they have expended. If that were the legal standard, then inefficient, incompetent or unethical lawyers would be entitled to claim whatever exorbitant fees they decide to seek. The federal appellate courts have unanimously held that reasonableness of fees incurred by a lawyer is determined by the court and not by the prevailing party or his counsel. *See, Blum v. Stenson*, 465 U.S., at 895 n. 11; *U.S. v. Metropolitan Dist. Com'n*, 847 F.2d 12, 17 (1st Cir. 1988); *King v. Greenblatt*, 560 F.2d 1024, 1027 (1st Cir. 1977). In the process of its determination, the district court is required to follow established guidelines and consider relevant factors to arrive at a reasonable fee, including the court's own personal knowledge and familiarity with prevailing rates in the area. *See, Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717 (5th Cir. 1974); *Salvini v. Flushing Supplies Corp.*, 137 F.R.D. 190, 193 (D.Mass. 1991). No such determination was ever made by the district court nor were the relevant factors ever considered. Under these legal guidelines, fees which are grossly excessive in nature and unreasonable on their face, as is the case here, can fall into the realm of the Eighth Amendment and Due Process protections.[4]

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4. Petitioners contend that the actual fees incurred by respondents are far less than the fees claimed by respondents' counsels. See Petition at 9. It is interesting but not surprising that respondents have not, and cannot deny petitioners' assertion in this regard.

III. CONCLUSION

Petitioners respectfully request review on the Writ Of Certiorari based on the following considerations:

1. The First Circuit's decision in the instant case is in conflict with its own decisions in *Gabriele, Wojtkowski, and Foley*, and the decision of the Massachusetts Supreme Judicial Court in *Strand*;

2. The First Circuit's reliance on *McDonald*, a Third Circuit decision, is improper as *McDonald* is in conflict with the First Circuit's decisions in *Gabriele, Wojtkowski, and Foley* relating to the same matters;

3. The First Circuit's decision has resulted in a fee award which is unreasonable on its face and which constitutes an unmistakable windfall to respondents' counsels in conflict with decisions of this Court; and

4. The First Circuit's presumption of waiver under the circumstances, and the district court's grant of grossly excessive fees to civil rights defendants without indicating the legal basis, presents important issues of law and policy to warrant review.

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